

delivered the judgment of the board said at A ([1961] 3 All E.R. page 625):

"It was, therefore, quite proper for him to appeal to the annual conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed he does not by so doing forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal".

Counsel for the respondents relied on the case of *Andrea v. British Italian Trading Company, Ltd.*⁽²⁾ and contended that the decision of the sub-committee superseded that of the deputy president and as it is not alleged that there was any failure on the part of the sub-committee to observe the rules of natural justice, the appellants cannot succeed on this point. In that case the English Court of Appeal held that it was clear under the rules appended to the contract which was the subject matter of an arbitration, where there is an appeal from an award of arbitrators or an umpire to the board of appeal, the award of the board of appeal supersedes that of the arbitrators or umpire and is the only binding award. There was a section in the Arbitration Act 1950 (section 23) enabling the High Court to set aside the award where an arbitrator or umpire has misconducted himself or the proceedings. The Court of Appeal held therefore that as the appellants had elected to appeal under the rules to the board of appeal rather than to proceed under section 23 of the Arbitration Act, the consequence of their doing so under the rules is that the award of the umpire was superseded by the award of the board of appeal, the tribunal of their own choice.

In the present case there were no rules similar to those appended to the contract in *Andrea's* case and it is clear from the evidence that notwithstanding the decision of the sub-committee, the decision of the deputy president summarily dismissing the appellants is the only existing decision.

I am accordingly of the opinion that the appellants have been wrongfully dismissed under these regulations. The matter does not end there however. They have chosen in bringing this action before the courts to contest the issue whether they were entitled to refuse to perform certain work they were instructed to perform and whether such refusal entitled the respondents to summarily dismiss them under their terms of employment. In their further and better particulars the appellants pleaded that "it was an implied term of the plaintiffs' employment that they could not be dismissed from service unless they committed misconduct or deliberately refused to carry out the lawful orders of their superiors which were confined to the type of work for which they were primarily engaged."

The trial judge has found on the evidence that they had wilfully refused to obey the lawful orders of their employers. He has also found that labourers, under which category the plaintiffs fall, were, under a document relied on by the appellants, obliged to do their work both inside and outside the power station. He has further found that the actual work which the appellants were called upon to do, the refusal to perform which resulted in their dismissal, was work which did not involve skill, was work well within the capabilities of an ordinary labourer and was work which the second appellant as well as other labourers had previously done. All these findings have not been challenged before us and indeed any such challenge would have been in my opinion entirely devoid of merit. On those findings the respondents in my opinion are entitled under the law of master and servant to dismiss the appellants summarily and this they did. The appellants have accordingly failed on this issue and it follows in my judgment that their appeal should be dismissed with costs.

Barakbah C.J. (Malaya) concurred.

Appeal dismissed.

Solicitors: L. A. J. Smith; Drew & Napier.

GULWANT SINGH v. ABDUL KHALIK

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 2, 1965]

[K.L. — Federal Court Civil Appeal No. 35 of 1964]

Moneylending — Book kept in compliance with s. 18, Moneylenders Ordinance, 1951 — Failure to record payment — Effect of.

Practice and Procedure — Appeal — Findings of fact — Point not raised at trial by defendant — Discretion.

The plaintiff a licensed moneylender lent a sum of money to the defendant. At the trial the plaintiff said the sum in question was \$2,500 and the defendant said it was \$2,000. The memorandum and promissory note which evidenced the transaction were for \$2,500. Certain payments had been made by the defendant to the plaintiff who said these amounted to \$500. The defendant said they amounted to \$2,000. The trial judge ([1964] M.L.J. 286) found that the amount lent was \$2,500 as averred by the plaintiff and that the amount repaid was \$2,000 as averred by the defendant. On these findings he gave judgment for the plaintiff for \$1,717.73 being the amount due by defendant by way of principal and interest, and costs. Against this decision both parties appealed. The plaintiff attacked the trial judge's finding that the amount repaid by the defendant was \$2,000. The defendant attacked the finding that the original loan was \$2,500. He also argued, although he did not raise the point at the trial, that if the trial judge's finding that the amount paid by him was \$2,000 be upheld then the claim was wholly unenforceable because the plaintiff had not complied with section 18 of the Moneylenders Ordinance which relates to moneylenders' books. The moneylender's ledger produced at the trial showed that the only repayments recorded were three sums of \$100 each. For the plaintiff it was submitted that this point had

not been raised at the trial and as it was raised for the first time on appeal, the Federal Court should not give effect to it.

Held: (1) with regard to the findings of fact, the questions which arose were essentially questions of credibility. In the circumstances it would be wrong for the Federal Court not to accept the judge's findings;

(2) the question of whether effect should be given to a point not raised at the trial and which is raised for the first time in the appellate court, is one for discretion and the principles on which that discretion may be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance Co. v. Kavanagh* (4);

(3) in the present case there was no question of "deciding nice questions of fact". As the ledger produced at the trial by the plaintiff was a book kept by him in compliance with the provisions of section 18 of the Moneylenders Ordinance, and as it did not record sums amounting to \$1,500 paid by way of repayment, the clear effect of section 18 was that the plaintiff's claim was unenforceable as the provisions of section 18 are mandatory, any excuse by the plaintiff would have availed him nothing. The defendant's cross-appeal must therefore be allowed and the plaintiff's appeal dismissed.

[Editorial Note: See *Thomas v. Marconi's Wireless Telegraph Co. Ltd.* [1965] 2 W.L.R. 850; [1965] 2 All E.R. 598 where the English Court of Appeal held that, assuming that the point had not been argued before the judge, nevertheless the position of a respondent, who was brought to the Court of Appeal against his will, was necessarily quite different from that of an appellant who initiated the proceedings in that court; while it was right that an appellant should be precluded from raising for the first time in the Court of Appeal a point not taken below, there was no similar justification for shutting out a respondent from taking any point in support of the judgment which he had obtained.]

Cases referred to:—

- (1) *Kasumu v. Baba-Egbe* [1956] A.C. 539.
- (2) *The "Tasmania"* (1890) 15 App. Cas. 223, 225.
- (3) *Perkowski v. Wellington Corporation* [1959] A.C. 53, 69.
- (4) *Connecticut Fire Insurance Co. v. Kavanagh* [1892] A.C. 473, 480.
- (5) *Sutherland v. Thomson* [1906] A.C. 51, 55.

FEDERAL COURT.

Peter Mooney for the appellant.

K. Chelvanayagam for the respondent.

Cur. Adv. Vult.

Thomson L.P.: The plaintiff in this case is a licensed moneylender and the defendant is a person who borrowed money from him.

It is admitted that on 26th March, 1959, the plaintiff lent a sum of money to the defendant. The plaintiff said the sum in question was \$2,500 and the defendant said it was \$2,000. Subsequently certain payments were made by the defendant to the plaintiff. The plaintiff said these amounted to \$500, the defendant said they amounted to \$2,000.

The case has had an unfortunate history.

The judge who first tried it found that the amount lent was \$2,000. From that finding it

A followed that the particulars contained in the memorandum and promissory note which evidenced and transaction and which were for \$2,500 were not correctly stated and therefore the transaction was unenforceable by reason of section 16 of the Moneylenders Ordinance. Judgment was accordingly entered for the defendant.

Against that decision the plaintiff appealed and for reasons which were stated at the time the then Court of Appeal allowed the appeal and ordered a new trial.*

C At the second trial the judge found that the amount lent was \$2,500 as averred by the plaintiff and that the amount repaid was \$2,000 as averred by the defendant. On these findings he calculated that the amount due by the defendant by way of principal and interest was \$1,717.73 and gave judgment for the plaintiff for that sum with costs on the subordinate courts' scale.

D Against that decision both parties have now appealed.

E The plaintiff has attacked the trial judge's finding that the amount repaid by the defendant was \$2,000. On the other hand the defendant has attacked the finding that the original loan was \$2,500. He has also argued, and he admits that he did not raise the point at the trial, that if the judge's finding that the amount paid by him was \$2,000 be upheld then it clearly follows that the plaintiff has not complied with section 18 of the Moneylenders Ordinance which relates to moneylenders' books and that his claim is therefore wholly unenforceable.

F As regards the amount of the original loan the amount shown in the promissory note which the defendant signed was the amount stated by the plaintiff, that is \$2,500. The defendant's story, however, was that though he signed for \$2,500 the amount he actually received was only \$2,000. This story is of a sort which is frequently told in this type of case, there is nothing inherently improbable about it and sometimes, no doubt, it may be true.

G The plaintiff, however, swore that the amount paid was \$2,500 and on this his evidence was supported by a young lady solicitor who witnessed the transaction and a solicitor's clerk who was present when it took place both of whom showed a remarkable capacity for recollecting on 24th March, 1964, which was the date of the trial, details of events which had taken place in March, 1959.

H It was on this evidence that the trial judge found as a fact that the amount lent was \$2,500.

* [1963] M.L.J. 93.

As regards the amounts paid by him to the plaintiff the defendant's story was that from the date of the loan until 19th July, 1960, he paid sums amounting in all to \$1,500. On 19th September, 1960, the plaintiff's solicitor wrote him a letter of demand on the basis that he had paid nothing. He replied on 24th September, 1960, pointing out that he had already paid \$1,500 of which he gave particulars, forwarding another \$100 and promising to pay \$100 a month till the whole amount due by him was paid off. He paid three further sums of \$100 before the issue of the writ and another \$100 after the writ was issued.

As regards this part of his story the defendant's evidence was supported by that of his clerk and his cashier. The cashier said he had made payments to the plaintiff from time to time and informed the clerk of the amounts and the clerk said that the payments were made and that he recorded them from time to time as they were made in a rough book which he produced.

The plaintiff's reply to this was that he admitted receiving the last \$500 alleged by the defendant but that he denied receiving the earlier payments amounting to \$1,500. He said that until he instructed his solicitors to write the letter of 19th September, 1960, he made no attempt to collect anything from the defendant. He was quite content to see his interest mounting up. As regards a period of three months when he was in India his evidence was supported by his clerk who said he received nothing from the defendant during that period.

It was on this evidence that the trial judge found as a fact that the defendant had paid to the plaintiff sums amounting in all to \$2,000.

With regard to these findings of fact I do not propose to discuss the evidence in detail. Such documentary evidence as there was little better than worthless. The questions which arose were essentially questions of credibility and the parties would clearly seem to be of that class of persons whose standard of truth is teleological rather than objective, at least in relation to evidence in a court of law. Nor would any useful purpose be served by examining in detail the process of reasoning by which the judge arrived at conclusions which, at first sight, appear to be based on mutually destructive views as to the relative credibility of the parties.

Reading the trial judge's judgment as a whole the truth clearly is that he was not prepared to treat either of the parties as a person on whose unsupported word he would hang a dog. As regards the amount paid by the plaintiff, however, he clearly accepted as true the evidence of the young lady solicitor and the solicitor's clerk. And they, of course, could not

A speak to the matter of repayment. And as regards the amount repaid he clearly accepted the evidence of the defendant's clerk and cashier. He pointed out that the bare fact that they were employed by the defendant was not in itself a good ground for disbelieving them. He forebore to point out, though here it is equally in point, B that the young lady solicitor and the solicitor's clerk was employed by the plaintiff's solicitors.

In the circumstances it would in my view be wrong for this court not to accept the judge's findings.

C That, however, is not the end of the matter for there remains the argument that by reason of failure to comply with the obligations of section 18 of the Moneylenders Ordinance the plaintiff is not entitled to enforce his claim. That section reads as follows:—

D "18. (1) Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Ordinance clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

E (2) If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable to a fine not exceeding fifty dollars, or in the case of a continuing offence, to a fine not exceeding ten dollars for each day or part of a day during which such offence continues."

F The question arises in this way. At the trial the plaintiff produced what he called his ledger. He also produced some loose sheets of paper containing which, he said, were a record of his transaction with the defendant which he kept for his own information. But the ledger was the only book which he produced and he said G the entries in it were made by his clerk. This book is a substantially bound volume with numbered pages and each page is printed and ruled in a way that facilitates compliance with section 18. Indeed the book is obviously designed by a stationer for that very purpose. H There are spaces for the name, address and vocation of the borrower. There are spaces for the date, the amount, the interest and the terms of repayment of the loan. And then there are spaces for recording repayments — the date, the amount and whether in respect of principal or interest. The defendant's loan appears at page I 83 of this volume and the only repayments recorded are three sums of \$100 each made on 28th September, 17th November and 3rd December, 1960.

In the circumstances it is impossible to resist the conclusion that this ledger is the book kept by the plaintiff under the provisions of

section 18 and as it does not record the sums amounting to \$1,500 paid by way of repayment prior to 27th September, 1960, the clear effect of section 18 (if effect is to be given to it) is that the plaintiff's claim is unenforceable.

For this conclusion there is no need to look further for authority than the judgment of the Privy Council in the case of *Kasumu v. Baba-Egbe*.⁽¹⁾ In that case their Lordships were concerned with the effect of section 19 of the Nigerian Moneylenders Ordinance which is *in pari materia* with section 18 of our Ordinance. There Lord Radcliffe said (at p. 546) that the effect of that section was:—

“that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money.”

Later he said that such requirements as those contained in the section “strike indifferently at all moneylender's loans” and went on (at p. 551):—

“When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made.”

If we are to give effect to it the argument is conclusive. It is said, however, that we should not give effect to it for it has been raised before us for the first time.

A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinised (*The “Tasmania”* ⁽²⁾). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v. Wellington Corporation* ⁽³⁾) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co. v. Kavanagh* ⁽⁴⁾ (per Lord Watson):—

“When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.”

In the present case there can be no question of “deciding nice questions of fact”. The

A plaintiff himself produced the book as that in which he kept his account of his transaction with the defendant. In the light of the whole of his evidence it is inconceivable that if his attention had been directed to the state of the book he would have offered any excuse such as mistake for failure to record payments which he strenuously asserted had never been made. And even if by some sort of tergiversation he had managed to produce some such excuse it would not have been believed and in any event it would have availed him nothing for the provisions of section 18 are mandatory.

C In the circumstances I would with respect adopt the words of Lord Halsbury in the case of *Sutherland v. Thomson*:—⁽⁵⁾

D “I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the court below, because this House ought to make such an order as ought to have been made originally.

E For the reasons I have stated I would dismiss the appeal and allow the defendant's cross-appeal. In view of the grounds on which I would allow the cross-appeal there may be some question of apportionment of costs and I would wish to hear counsel on the point.

E Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed;

defendant's cross-appeal allowed.

F Solicitors: Skrine & Co.; K. Chelvanayagam.

KARUPPIAH v. KEHAR SINGH

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 3, 1965]

G [K.L. — Federal Court Civil Appeal No. 36 of 1964]

Moneylending — Memorandum not stating terms of promissory note or collateral security — Plaintiff's copy of memorandum not authenticated — Whether memorandum and promissory note can be read together — Moneylenders Ordinance, 1951, s. 16 — Evidence Ordinance, 1950, s. 114(g).

H The defendant Karupiah borrowed from the plaintiff Kehar Singh who was a licensed moneylender a sum of \$11,500. The defendant signed two documents; one was a promissory note signed by the defendant and countersigned by the plaintiff, and the amount lent was stated therein to be the sum of \$11,500; the other document was a memorandum of the contract in which the amount lent was stated to be the sum of \$11,500. The amount actually handed to the defendant was \$11,464, the sum of \$36 having been deducted for the purpose of paying stamp duty on the documents. The defendant by way of collateral security for the repayment of the loan, deposited with the plaintiff the title deeds relating to certain lands owned by the defendant. The memorandum did not contain all the terms of the contract, especially the term regarding the collateral security, but the promissory note and the memorandum were